

The Role of the Constitutional Court of the Kingdom of Thailand to strengthen democracy and maintain harmony in society

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Before 1997, Thailand has experiences with 16 coup d'états and Implemented 15 difference constitutions. In order to deal with the problems of electoral corruption, the drafters of Thai Constitution 1997 focused on limiting governmental power by increasing the exercise of judicial power in reforming a legal system. The first establishment of the Constitutional Court was created by the 1997 Constitution, resulted from the political instability following the ending of absolute monarchy in 1932. This Court was designed to be the guardian of democracy. The constitution also empowers the Constitutional Court to monitor the process of democracy and to keep it to constitutional values as the democratic regime of government with the King as Head of State. Over the course of the past twenty-four years, the Court has produced a significant body of constitutional case law on the meaning and shaping the character of Thai politics while adhering to the rule of law and protecting rights and liberties of people.

This paper describes the Constitutional Court's authority to monitor the general election as protecting the right to vote in the democratic process, focuses on its role in the struggle of political crisis in the post-2006 coup Thailand and preserving public trust through its landmark rulings. Part I provides an overview of the general elections in Thailand from past to present and then explains the organs whose functions perform regarding to the election case in the current time. Part II presents the duties and the power of the

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Constitutional Court of Thailand regarding to the election case. Then Part III shows three significant constitutional court rulings concerning the election. Finally, Part IV concludes this paper by looking at all the factors that led the Constitutional Court to become one of the democracy mechanisms and maintain the harmony in Thai society.

Part I: an Overview of the General Elections in Thailand and the Responsibilities Organs which conduct and adjudicate the electoral dispute.

After the Siamese revolution of 1932 that ended the absolute monarchy on 24 June 1932 and transferred to constitutional monarchy, the first election was as early as 1933, only a year after the revolution but the election was held on an indirect basis, with voters elected sub-district representatives, and the representatives then elected members of parliament. All candidates ran as independents because there were no any political party at that time and was also no particular organ conduct this election and review the election fraud while the responsibility of overseeing elections fell on the Ministry of Interior. Even the later general elections were direct, the elections were organised by the Ministry of Interior as remained unchanged from 1933 to 1996. In the past, petitions or cases against candidates who violated the election law were taken to a normal court. When the Constitution 1997 promulgated, the establishment of the Election Commission of Thailand (ECT), to replace the Ministry of the Interior in the task of organising elections. The ECT which was created by the Constitution 1997 is responsible for holding, or causing to be held, in an honest and fair manner, the election of members of the House of Representative, senators, members of local assemblies and local administrators, including voting in a referendum. The ECT is also the political party registrar and is responsible for the Political Party Development Fund.

At the current time, prior to the announcement of the result of elections, the ECT can conduct an investigation and inquiry on a candidate if the candidate violated or facilitated other persons to infringe the law, or knew about this action but did not inform anyone; and that this act is likely to cause the election to be dishonest and unfair. In this

case, the ECT can temporarily suspend the election right of a candidate for a period of not more than one year effective from the date of the ECT order. Such order shall be final. Additionally, the ECT has the power to order a new election to be held in such polling station or constituency if there is evidence to reasonably believe that such election or selection has not proceeded in an honest or just manner.

After announcing the result of election, the particular judicial body which has authority to decide election cases is the Supreme Court according to Section 226 of the Constitution stated that after announcing the result of an election of members the House of Representative or selection of the Senators, if there appears evidence to reasonably believe that a candidate of the election has committed a dishonest act in the election or has connived at such act of other persons, the Election Commission shall submit a petition to the Supreme Court for an order to revoke the right to stand for election or the right to vote of such person . If the Supreme Court decides that such person has committed an offence as petitioned, the Supreme Court shall order the revocation of the right to stand for election or the right to vote of such person for a period of ten years, in accordance with the Organic Act on the Election of Members of the House of Representatives. In addition to Section 8 of Organic Act on the Election of Members of the House of Representatives³ and it is not only the role of the Supreme Court or the Supreme Court's Division of the Election Cases but also the Court of First Instance as the said provision provided that the Court of First Instance with jurisdiction in the constituency may be assigned to receive motions for referral to the

³Organic Act on the Election of Members of the House of Representatives, B.E.2561 (2018)

Section 8. Any trial and decision of the Supreme Court under this Organic Act shall be in accordance with the Rule of the general assembly of the Supreme Court as published in the Government Gazette, under which it shall be specified that trial must be conducted in an expeditious and fair manner. In this regard, the competent Court of First Instance in the constituency in question may be specified to receive motions for referral to the Supreme Court for decision or may be specified to conduct evidence inquiries or other necessary proceedings on behalf of the Supreme Court.

In the performance of duties of the Supreme Court in connection with an election under this Organic Act, judges attending a general assembly of the Supreme Court, judges constituting a quorum of judges and persons entrusted by a quorum of judges to perform duties are entitled to meeting allowances or remuneration, as the case may be, in accordance with the Rules prescribed by the Administrative Commission of Courts of Justice under the law on administrative organisation of Courts of Justice.

Supreme Court for a ruling or may allow the said Court of First Instance to examine evidence or take other necessary actions on behalf of the Supreme Court.

As mentioned above, the ECT is the key organisation which is responsible for election in Thailand especially prior to the announcement of the result of elections, although the Supreme Court has the power to give a decision on the election fraud and revoke the right to vote of any candidate or person who has committed an act constituting election fraud after the announcement of the election result. Furthermore, in the case where the Supreme Court orders revocation of the right to candidacy in an election or orders revocation of the right to vote of any candidate or member of the House of Representatives and such revocation gives rise to a new election, the Supreme Court has to order such person to be liable for expenses incurred in the election which has caused the Supreme Court to render such order. These mechanisms enhance the election to ensure the achievement of democratic goals and engage the fundamental principle of free and fair election through freely chosen representatives, to vote in such elections by secret ballot.

Part II: Duties and Power of the Constitutional Court of Thailand regarding to the Election Case

As explained above, prior to the announcement of the result of elections, the role of investigation and inquiry on a candidate belongs to the ECT and the role of adjudication after announcing the result become to the Supreme Court. Nevertheless, the Constitutional Court of Thailand also has the power to adjudicate the cases concerning the election and the democracy manner as protecting the right to protect the constitution and the form of government and considering the qualification of the Membership of the parliament as follows.

(1) Ruling on a petition to restrain an action to overthrow the democratic form of government with the King as Head of State (section 49 of the Constitution)

The Constitution empowers this function as the protector of the constitution to the Constitutional Court which firstly provided in the Constitution 1997 and continually keeps this function to the current constitution. According to Chapter 3, Rights and Liberties of the Thai People, of the Constitution provides that a person may not exercise a right or liberty to overthrow the democratic form of government with the King as Head of State. Any person who has knowledge of such an action has the right to petition to the Attorney-General to request for a Constitutional Court order to restraint such an action. However, if the Attorney-General dismisses the petition or fails to take any action within 15 days of receiving the petition, the petitioner may submit a direct application to the Constitution. Such proceeding does not prejudice criminal proceedings against the person committing the act to overthrow the democratic form of government with the King as Head of State.

(2) Ruling on dissolution of a political party pursuant to section 92 of the Organic Act on Political Parties B.E. 2560 (2017).

It is not only given the power to protect the democratic form of government to the Constitutional Court by the Constitution, it is also given this power to the Constitutional Court through the organic act as provided in Section 92 of the Organic Act on Political Parties B.E. 2560 (2017) that causes for political party dissolution in the case where the Election Commission has reasonable evidence to believe that a political party has committed an act to overthrow the democratic form of government with the King as Head of State or an act to acquire national government powers by means that are not provided by the Constitution, or act in a way that is hostile to the democratic form of government with the King as Head of State, or the political party violates a provision of law or there is a cause for dissolution of political party as provided by law. In such an event, the Election Commission may submit an application to the Constitutional Court for an order to dissolve the political party. If the Constitutional Court finds after an inquiry that the political party has committed an act constituting such a cause, the Constitutional Court shall order the

dissolution of the political party and withdraw the election candidacy rights of such political party's executive committee.

In addition, section 93 of such the Organic Act also provides that when the Political Parties Registrar finds that a political party commits an act constituting a cause for political party dissolution under section 92, the Election Commission may itself submit an application or task the Political Parties Registrar to submit an application and participate in proceedings on its behalf. In the interest of proceedings, the Political Parties Registrar by the approval of the Election Commission may request the assistance of the Attorney-General in proceedings in the Constitutional Court until the conclusion of the case.

When the Constitutional Court has an order to dissolve such political party, it is compatible with section 94 paragraph two of the Organic Act on Political Parties B.E. 2560 (2017), which prohibited a former office holder in the executive party of a dissolved political party whose election candidacy rights had been revoked from registering a new political party or from becoming a political party executive or from participating in the establishment of a new political party for a period of ten years as from the day of Constitutional Court order to dissolve such political party.

(3) Ruling on the qualifications and disqualifications of a political office holder

According section 82 of the Constitution, the Constitution Court has the competence to decide on the termination of membership or qualification of a Member of the House of Representatives or Senator **or** lack of qualifications for candidacy in an election of Members of the House of Representatives.

Members of the House of Representatives or Senators constituting not less than one-tenth of the total number of existing Members of each House have the right to enter their names in a petition to the President of the respective House for termination of membership of a Member of that House. Then, the President of the House receiving the petition shall

refer the petition to the Constitutional Court for a ruling on whether or not membership of such person terminates.

Additionally, The Election Commission may have the opinion that the membership of a Member of the House of Representatives or Senator terminates under the Constitution and may refer the matter to the Constitutional Court for a ruling.

Part III: the Landmark Cases of the Constitutional Court of the Kingdom of Thailand concerning election

As previously described that the competence of the Constitutional Court of the Kingdom of Thailand on election case is limited; thus, there are few rulings concerning election. However, the Constitutional Court rulings relating to election were significantly affect peace and democratic regime especially, three selected rulings as follows;

1. The Arrangement of Polling Station Case (The Constitutional Court ruling No. 9/2549 (2006))

The Ombudsman (applicant) submitted an application together with an opinion to the Constitutional Court for a ruling on constitutionality problems concerning the Election Commission's proceedings with respect to the general election of members of the House of Representatives from 2nd April B.E. 2549 (2006) till present. The applicant stated that The arrangement of polling stations in such a way that the eligible voter faced the polling station while turning their backs on the election unit committee members and members of the public who had arrived to exercise their voting rights, as well as third party observing the election at the unit, was a violation of the principles of voting which had to be carried out by means of direct and secret votes.

Even though the Election Commission explaining that the new arrangement of polling station would enable the polling unit election committee to observe the behavior of voters while casting their votes, the Constitutional Court found that the format of

arrangements in the polling stations in the election of members of the House of Representatives on 2nd April B.E. 2549 (2006) caused the casting of votes by eligible voters to be made within distance of the constituency election committee, which was also represented by political parties fielding candidates in such constituency or in the party-list who had interests in the elections, to visibly observe the casting of votes by eligible voters. Such new arrangement of the polling station therefore rendered the votes in the election of members of the House of Representatives to be made not by means of secret votes as required under the Constitution.

The Constitutional Court found that the general election of members of the House of Representatives held on 2nd April B.E. 2549 (2006) together with the arrangement of polling stations pursuant to the resolution of the Election Commission, were elections which produced unfair election results that were not truly democratic and therefore the elections were unconstitutional.

After the math, the election was declared invalid by the Constitutional Court. New election was scheduled for October 2006.

(2) Twenty Percentage Minimum Votes Rule Avoidance Case (The Constitutional Court ruling No. 3-5/2550 (2007))

The main topic of this ruling is concerning section 74 of the Organic Act on Election of Members of the House of Representatives and Senator, B.E. 2541 (1998) which provided that *“In any constituency, if, on the election day, there is one candidate standing for an election on a constituency basis and such candidate receives votes at least twenty percent of the total number of voters in that constituency, the Election Commission shall announce such candidate to be the person elected.*

In the case where the only candidate standing for an election under paragraph one receives votes of less than twenty percent of the total number of voters in that constituency, the Election Commission shall hold a new election in such constituency.”

In this case, it was found that the executive committee members of the 3rd respondent party financially sponsored the 1st respondent and the 2nd respondent to field election candidates to avoid the case of having only one candidate and such candidate receiving less than 20 per cent of the total number of eligible voters in such constituency, in which case a new election had to be held. They also conspired with the leaders of the 1st respondent party and the 2nd respondent party in issuing false party membership certificates to enable the candidates to use such certificates as evidence in election candidacy applications. It was deemed that the 3rd respondent committed acts deemed to acquire the power to rule the country by any means which was not in accordance with the provisions of the Constitution and constituted a threat to State security or was contrary to the law, public order or good morals under section 66(1) and (3) of the Organic Act on Political Parties, B.E. 2541 (1998).

As for the 1st respondent and the 2nd respondent, it was deemed that they had acted in hostility to the democratic regime of government with the King as Head of State under the Constitution and constituted a threat to State security or was contrary to the law, public order or good morals under section 66(2) and (3) of the Organic Act on Political Parties, B.E. 2541 (2008).

Therefore, an order was issued to dissolve the 1st respondent party, the 2nd respondent party and the 3rd respondent party, and the right to vote of the 111 executive committee members of the 3rd respondent party, 19 executive committee members of the 1st respondent party and three executive committee members of the 2nd respondent party were revoked for a period of five years as from the date of political party dissolution order.

In this case, it shows judicial neutrality as the Justice of the Constitutional Court show no political or cultural bias when reaching verdicts even the 3rd respondent political party was one of the major parties in Thailand and got the majority of the votes in an election of 2006. The Court still adhere to the rule of law and democratic process.

(3) Same day General Election Case (The Constitutional Court ruling No. 5/2557 (2014))

This ruling was rendered according to section 107 of the Constitution of the Kingdom of Thailand, B.E. 2550 (2007) which provide that “... the election date must be the same throughout the Kingdom”

The Constitutional Court held that the election date could extend over a period of several days, such as polling outside of a constituency and advance polling. However, an exercise of voting right was possible only when there were candidates on the election date in order to enable the voter to cast a vote, whereas, the election date for Members of the House of Representatives could only be one day under section 108 paragraph two of the Constitution. Upon finding that there were no candidates in 28 constituencies, it was thus deemed that no general election was held in those constituencies. It was therefore not within the competence of the Election Commission and the Supreme Court to hold new elections. In addition, section 93 paragraph one and paragraph six of the Constitution intended for the installation of all five hundred Members of the House of Representatives who had to come from a general election on the same day throughout the entire Kingdom pursuant to section 108 paragraph two of the Constitution. Upon the Prime Minister did not postpone the general election day and the general election was held on 2nd February B.E. 2557 (2014), which failed to carry out polls in 28 constituencies. Thus, it was deemed that 2nd February B.E. 2557 (2014) was not the day when a general election day for Members of the House of Representatives was held throughout the Kingdom. The election was therefore unconstitutional and as a consequence the Royal Decree to Dissolve the House of Representatives, B.E. 2556 (2013), only with respect to the part prescribing the general

election of Members of the House of Representatives on 2nd February B.E. 2557 (2014), raised questions of constitutionality under section 108 paragraph two of the Constitution.

Part IV conclusion

This paper shows the experience of the Constitutional Court of Thailand concerning the election. The Court plays the important role along with principle of the supremacy of the constitution and the last resort for check and balance the election process which remain neutral politic. Moreover, the decision of the Constitutional Court is the final and binding on the Parliament, the Council of Ministers, Courts, Independent Organs, and state agencies as the Constitution provided so that is all factors to lead the Constitutional Court to become one of the democracy mechanisms and maintain peace in Thai society. Three selected constitutional rulings establish democratic political stability and support processes to end civil conflicts in the society.